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 19 NETWORK SOLUTIONS, LLC

20 12 UNITED STATES DISTRICT COURT

21 13 NORTHERN DISTRICT OF CALIFORNIA

22 14 SAN FRANCISCO DIVISION

23 15 \_\_\_\_\_ )  
 24 16 DOE, Individually And On Behalf Of All ) No. C 07-5115 JSW  
 25 17 Others Similarly Situated, )  
 26 ) Plaintiff, ) DEFENDANT NETWORK  
 27 ) vs. ) SOLUTIONS, LLC'S MOTION TO  
 28 ) NETWORK SOLUTIONS, LLC, ) STRIKE PURSUANT TO FEDERAL  
 29 ) Defendant. ) RULE OF CIVIL PROCEDURE 12(f)  
 30 \_\_\_\_\_ )  
 31 ) Judge: Hon. Jeffrey S. White  
 32 ) Date: January 25, 2008  
 33 ) Time: 9:00 a.m.  
 34 ) CrtRm: 2

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DEFENDANT'S MOTION TO STRIKE  
 UNDER FRCP 12(f))  
 Case No. C 07-5115 JSW

1

**NOTICE OF MOTION AND MOTION TO STRIKE**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on Friday, January 25, 2008, at 9:00 a.m., before the  
 4 Honorable Jeffery S. White, in Courtroom 2, 450 Golden Gate Avenue, San Francisco,  
 5 California, defendant **NETWORK SOLUTIONS, LLC** will move and hereby does move,  
 6 pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, to strike portions of the  
 7 complaint (Dkt. 1) filed anonymously by plaintiff “**DOE**.”

8 This motion is made on the grounds that the certain language of the complaint is  
 9 directly contradicted by the written agreement quoted therein, of which the Court may  
 10 properly take judicial notice, or by an applicable statute. This motion is based on this  
 11 notice of motion, the memorandum that follows, the request for judicial notice filed  
 12 herewith, Defendant’s concurrent motions to dismiss under Rules 12(b)(1), 12(b)(3) and  
 13 12(b)(6) of the Federal Rules of Civil Procedure, which are incorporated herein by  
 14 reference, all pleadings and records on file in this action, and any other arguments and  
 15 evidence presented to this Court at or before the hearing on this motion.

16 **ISSUE TO BE DECIDED**

17 Should the Court strike provisions of the complaint (Dkt. 1) that are inconsistent  
 18 with the parties’ written agreement and inconsistent with applicable law?

19 **POINTS AND AUTHORITIES**20 I. **Introduction**

21 The Class Action Complaint (“Complaint” or “CAC”) improperly filed  
 22 anonymously by plaintiff “Doe” (“Plaintiff”) acknowledges that “all Defendant’s customers  
 23 enter into a written agreement with Defendant.” CAC (Dkt 1) ¶9. Nevertheless, the  
 24 Complaint (i) demands a jury trial, which is expressly waived under the parties’ written  
 25 agreement; (ii) seeks compensatory, punitive, statutory, and other damages that also have  
 26 been expressly waived; and (iii) mislabels a selective quotation from the agreement as the  
 27 operative “Privacy Policy,” even though the written agreement expressly incorporates a  
 28 distinct Privacy Policy that was in effect during the relevant period. Additionally, one of

1 Plaintiff's claims is for \$3,000 in statutory damages under the California Consumer  
 2 Records Act (Count IV), but this remedy is not available under the provisions upon which  
 3 Plaintiff bases this claim.

4 All the foregoing language raises spurious legal claims and confuses the relevant  
 5 issues. Therefore, pursuant to Rule 12(f) of the Federal Rule of Civil Procedure ("FRCP"),  
 6 defendant Network Solutions, LLC ("Network Solutions" or "Defendant") moves the Court  
 7 to strike this improper language from the Complaint.

8 **II. Statement of the Case**

9 Network Solutions is in the business of registering domain names (e.g.  
 10 "janesbagels.com") and providing web-related services through its website and servers  
 11 located in Virginia.<sup>1</sup> CAC ¶5-6. Among other things, Defendant provides, for a fee,  
 12 internet-based email accounts (called "webmail" accounts) associated with customers'  
 13 domain names (e.g., "jane@janesbagles.com"). CAC ¶6.

14 Plaintiff alleges that in May 2007—months before renewing his Network Solutions  
 15 webmail account for the fourth time—he discovered certain of his emails "on Internet  
 16 search engines, including Google." CAC ¶4.<sup>2</sup> Plaintiff, however, does not claim that  
 17 Network Solutions is a search engine, that he discovered these emails on any medium  
 18 controlled by Network Solutions, or that any search results linked him to a website  
 19 affiliated with Network Solutions. Nor does plaintiff clearly allege that his emails remain  
 20 available online. Compare CAC ¶10 ("may still be available"), with ¶12 ("permanent,  
 21 public record"). He also does not allege any damages directly arising from the alleged  
 22 (temporary) publication of his emails on search engines.

23 \_\_\_\_\_  
 24 <sup>1</sup> Each computer connected to the Internet has a unique numeric address, known as an  
 25 Internet Protocol or "IP" address, whereby one computer or network identifies and  
 26 exchanges information with another. The Domain Name System ("DNS") was created to  
 allow a more easily remembered word or phrase (also called a "domain name") to be  
 associated with a specific IP address. The DNS allows the use of easily-remembered  
 domain names (e.g. "janesbagels.com") rather than numerical IP addresses.

27 <sup>2</sup> The Complaint repeatedly refers to Plaintiff using masculine singular pronouns. See e.g.  
 28 CAC, page 1, line 1 ("Plaintiff Doe, on behalf of himself....) (Emphasis added.)

1        Nevertheless, Plaintiff has sued Network Solutions in connection with the search  
 2        engines' purported publication of his emails. He alleges federal and state statutory claims,  
 3        and claims under California common law. As set forth separately in Defendant's  
 4        concurrent motions to dismiss under Rules 12(b)(1), 12(b)(3) and 12(b)(6), this California  
 5        action is wholly improper and should be dismissed in its entirety. Alternately, Defendant  
 6        requests that the Court strike the specific provisions of the Complaint identified below.

7        III. Standards Under Federal Rule of Civil Procedure 12(f)

8        The purpose of a motion to strike pursuant to Rule 12(f) is to allow the courts to  
 9        meet the widely recognized public policy goal of effectuating judicial economy by  
 10        removing matters that are "redundant, immaterial, impertinent, or scandalous matter."  
 11        FRCP Rule 12; see also Cazares v. Pac. Shore Funding, 2006 U.S. Dist. LEXIS 1081, at \*7  
 12        (C.D. Cal. Jan. 3, 2006). Whether to grant a Rule 12(f) motion is squarely within the  
 13        jurisdiction of the District Court. Federal Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921  
 14        F.2d 241, 244 (9th Cir. 1990). Such motions can in some instances be "viewed with  
 15        disfavor and are not frequently granted." Cazares at \*7. Nevertheless, where, as here, a  
 16        motion to strike seeks to omit language from a Complaint that gives rise to spurious legal  
 17        claims, it is justified. See e.g., Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th  
 18        Cir.1983) ("[T]he function of a 12(f) motion to strike is to avoid the expenditure of time  
 19        and money that must arise from litigating spurious issues by dispensing with those issues  
 20        prior to trial.")

21        IV. The Court May Properly Take Judicial Notice of Plaintiff's Service  
 22        Agreement

23        In order to obtain or renew a domain name or webmail account, each Network  
 24        Solutions customer must affirmatively agree to the terms of a written Service Agreement.  
 25        See CAC ¶9 ("[A]ll Defendant's customers enter into a written agreement with  
 26        Defendant...."). In October 2003, Plaintiff voluntarily and affirmatively entered into a  
 27        Service Agreement, and thereby registered a domain name and established a webmail  
 28        account. CAC ¶¶4, 9; see also Defendant's Request for Judicial Notice ("RFJN") Exh. 1 at

1 RFJN 0007 (“By applying for a Network Solutions service ... or by using the service(s)  
 2 provided ... under this Agreement, you acknowledge that you have read and agree to be  
 3 bound by all terms and conditions of this Agreement and documents incorporated by  
 4 reference.”). Each and every year through 2007 (including October 2007), Plaintiff  
 5 renewed and reaffirmed his agreement with Network Solutions. CAC ¶4; RFJN Exhs. 2-5  
 6 at RFJN 0056, 0091-91, 0133, 0225. He paid annual fees of \$34.99 for domain name  
 7 registration (CAC ¶6), and \$20.00 for his webmail account (CAC ¶4).

8 Plaintiff does not attach to the Complaint his Service Agreements with Network  
 9 Solutions, but he selectively quotes identical language found in each of the five agreements  
 10 that were in effect from 2003 to 2007. Compare CAC ¶9, with RFJN Exhs. 1-5 at RFJN  
 11 0025, 0075, 0109, 0178, and 0243-44. Thus, the Court may properly take judicial notice of  
 12 the written contracts that Plaintiff formed when establishing and renewing this arrangement.  
 13 See Branch v. Tunnell, 14 F.3d 499, 454 (9th Cir. 1994); In re Stac Electronics Securities  
 14 Litig., 89 F.3d 1399, 1405, fn. 4 (9th Cir. 1996).

15 V. The Court Is Not Bound By Allegations In the Complaint That Contradict  
 16 The Express Terms of the Service Agreements

17 Each version of the Service Agreement in effect from 2003 to 2007 contains several  
 18 nearly identical provisions that are dispositive in this case.<sup>3</sup> In particular, Plaintiff has  
 19 voluntarily, affirmatively, and on multiple occasions, waived various remedies the  
 20 Complaint improperly seeks to recover. It is proper to strike these allegations from the  
 21 Complaint, because the Court is not required to accept as true allegations that are  
 22 contradicted by matters, such as the Service Agreements, properly subject to judicial notice.  
 23 Mullis v. United States Bankr. Ct., 828 F2d 1385, 1388 (9th Cir. 1987). Nor is the Court

24 \_\_\_\_\_  
 25 <sup>3</sup> The five versions of the Service Agreement, which Plaintiff agreed to when he originated  
 26 his webmail account in October 2003 and when he renewed his account each year  
 27 thereafter, contain almost the exact same dispositive provisions. See RFJN Exhs. 1 - 5.  
 28 For the convenience of the Court, Defendant has set forth in its Request for Judicial  
 Notice a table cross-referencing the dispositive provisions from each version of the  
 Service Agreement. See RFJN p. 3. Defendant incorporates this table by reference into  
 this motion, as if set forth in its entirety herein.

1 required to accept as true unwarranted deductions of fact or unreasonable inferences. See  
 2 Bell Atlantic v. Twombly, 127 S.Ct. 1955, 1965 (2007); Clegg v. Cult Awareness Network,  
 3 18 F.3d 752, 754-55 (9th Cir. 1994).

4 Therefore, to effectuate judicial economy, reduce confusion and eliminate spurious  
 5 legal claims, Defendant respectfully requests that the Court strike the language of the  
 6 Complaint more specifically identified below.

7 VI. The Court Should Strike Language Inconsistent with the Governing Law  
 8 Provision

9 The Service Agreement contains a “Governing Law” provision waiving the right to  
 10 a jury trial and requiring any disputes over Defendant’s email services to be resolved in  
 11 Virginia subject to Virginia law. RFJN Exhs. 1-5 at RFJN 0007, 0055-56, 0091, 0133,  
 12 0225. As discussed in Defendant’s concurrent motion to dismiss under FRCP 12(b)(3), this  
 13 provision requires dismissal of this California action.<sup>4</sup> It also justifies striking Plaintiff’s  
 14 jury demand from the Complaint. See, e.g. Lindblom v. Secretary of Army, 2007 WL  
 15 1378019 (E.D.Cal.) (Jan. 20, 2007) (striking jury demand and compensatory damages  
 16 request as not available under plaintiff’s Age Discrimination in Employment Act claims);  
 17 Davison v. Hartford Life and Accident Ins. Co., 2005 WL 807045 (N.D. Cal.) (April 07,  
 18 2005) (striking jury demand pursuant to Rule 12(f)); Packagenet Inc. v. Neopost, Inc., 2005  
 19 WL 146894 (N.D.Cal.) (Jan. 20, 2005) (striking jury demand pursuant to Rule 12(f)).

20 Network Solutions, therefore, requests that the Court strike the following:

Caption:	<b>“JURY TRIAL DEMANDED”</b>
CAC at 15:24-25:	<b>“JURY TRIAL DEMANDED”;</b> “Plaintiff hereby demands a trial by jury.”

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26 <sup>4</sup> Pursuant to this Governing Law provision of the Service Agreement(s), this matter should  
 27 properly be heard in Virginia subject to Virginia law. See, e.g., RFJN Exh. 4 at RFJN  
 0133. Network Solutions, however, addresses Plaintiff’s claims in this motion under  
 California law, in the event that the Court declines to grant Defendant’s concurrent  
 Motion to Dismiss under FRCP Rule 12(b)(3).

28

VII. The Court Should Strike Language Inconsistent with the Exclusive Remedy and Time Limitation Provisions

The Service Agreement contains the following express waivers of liability:

**EXCLUSIVE REMEDY; TIME LIMITATION ON FILING ANY CLAIM.** YOU AGREE THAT OUR ENTIRE LIABILITY, AND YOUR EXCLUSIVE REMEDY, IN LAW, IN EQUITY, OR OTHERWISE, WITH RESPECT TO ANY NETWORK SOLUTIONS SERVICE(S) PROVIDED UNDER THIS AGREEMENT AND/OR FOR ANY BREACH OF THIS AGREEMENT IS SOLELY LIMITED TO THE AMOUNT YOU PAID FOR SUCH SERVICE(S) DURING THE TERM OF THIS AGREEMENT. IN NO EVENT SHALL NETWORK SOLUTIONS ... BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES EVEN IF NETWORK SOLUTIONS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. TO THE EXTENT THAT A STATE DOES NOT PERMIT THE EXCLUSION OR LIMITATION OF LIABILITY AS SET FORTH HEREIN NETWORK SOLUTIONS' LIABILITY IS LIMITED TO THE EXTENT PERMITTED BY LAW IN SUCH STATES. Network Solutions and its licensors and contractors disclaim any and all loss or liability result from, but not limited to:.... (2) loss or liability resulting from data non-delivery or data mis-delivery;.... (4) loss or liability resulting from the unauthorized use or misuse of your account number, password or security authentication option; (5) loss or liability resulting from errors, omissions, or misstatements in any and all information or service(s) provided under this agreement.... YOU AGREE THAT REGARDLESS OF ANY STATUTE OF LAW TO THE CONTRARY, ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY OF OUR SERVICES MUST BE FILED WITHIN ONE (1) YEAR AFTER SUCH CLAIM OR CAUSE OF ACTION AROSE OR SUCH CLAIMS SHALL BE FOREVER BARRED.

18 RFJN Exhs. 1-5 at RFJN 0003-04, 0052-53, 0088-89, 0127-28, and 0222.<sup>5</sup> In short, this  
19 provision waives (i) any remedy except for “the amount [he] paid for [Network Solutions]  
20 services” during the term of the operative Service Agreement; (ii) any recovery for  
21 “indirect, incidental, special or consequential damages,” and (iii) “any claim or cause of  
22 action [not] filed within one (1) year after such claim or cause of action arose.”

23 A waiver is an intentional relinquishment or abandonment of a known right. United  
24 States v. Olano 507 U.S. 725, 732 (1993); CBS, Inc. v. Merrick, 716 F.2d 1292, 1295 (9th  
25 Cir. 1983); Bickel v. City of Piedmont, 16 Cal.4th 1040, 1048 (1997). “California courts

<sup>5</sup> The last sentence of this provision is only found in the Service Agreements in effect from 2005-2007. Compare RFJN Exhs. 1-2 at RFJN 0003-04 and 0052-53, with Exhs. 3-5 at RFJN 0089, 0128, and 0222.

1 will find waiver when a party intentionally relinquishes a right, or when that party's acts are  
 2 so inconsistent with an intent to enforce the right as to induce a reasonable belief that such  
 3 right has been relinquished." Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d 1551,  
 4 1559 (9th Cir. 1991). Here, Plaintiff affirmatively and repeatedly agreed to the Service  
 5 Agreements containing these express waivers and limitations of liability. CAC ¶9; see, e.g.  
 6 RFJN Exh. 4 at RFJN 0133 ("By applying for a Network Solutions service ... or by using  
 7 the service(s) provided ... under this Agreement, you acknowledge that you have read and  
 8 agree to be bound by all terms and conditions of this Agreement and documents  
 9 incorporated by reference.") Further, Plaintiff renewed his account and reaffirmed the  
 10 Service Agreement after receiving notice of the alleged May 2007 publication of his emails  
 11 on various search engines. CAC ¶4. These actions demonstrate the intentional  
 12 relinquishment of a known right.

13 As a general rule, "a party may waive a benefit of a provision of a statute ... enacted  
 14 ... for his protection." Globe Grain & Milling Co. v. De Tweede Northwestern & Pacific  
 15 Hypotheekbank, 69 F.2d 418, 422 (9th Cir. 1934). With respect to rights secured by federal  
 16 statute, "absent some affirmative indication of Congress' intent to preclude waiver, we have  
 17 presumed that statutory provisions are subject to waiver by voluntary agreement of the  
 18 parties." United States v. Mezzanatto, 513 U.S. 196, 201 (1995). Likewise, under  
 19 California law: "The doctrine of waiver is generally applicable to all the rights and  
 20 privileges to which a person is legally entitled, including those conferred by statute unless  
 21 otherwise prohibited by specific statutory provisions." Outboard Marine Corp. v. Superior  
 22 Court, 52 Cal.App.3d 30, 41 (1975). The California Civil Code states: "Anyone may waive  
 23 the advantage of a law intended solely for his benefit. But a law established for a public  
 24 reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513. The  
 25 California Supreme Court has explained that this provision is not to be construed literally,  
 26 as "it is difficult to conceive of a statutory right enacted solely for the benefit of private  
 27 individuals that does not also have an incidental public benefit." Bickel v. City of  
 28 Piedmont, 16 Cal.4th at 1049, fn. 4. Thus, parties may waive any statutory right where its

1 “public benefit ... is merely incidental to [its] primary purpose,” but waiver is unenforceable  
 2 where it would “seriously compromise any public purpose that [the statute was] intended to  
 3 serve.” DeBerard Properties, Ltd. v. Lim, 20 Cal.4th 659, 668-669 (1999).

4 For the foregoing reasons, Defendant respectfully requests that the Court strike the  
 5 following: language that is inconsistent with Plaintiff’s express waivers:

6 CAC ¶8:26-9-4	“Pursuant to 18 U.S.C. § 2707, which provides for a civil action for 7 any persons aggrieved by a knowing or intentional violation of 18 8 U.S.C. § 2702, Plaintiff, and those similarly situated, seeks [sic] 9 preliminary and permanent injunction, declaratory and equitable 10 relief statutory damages, actual damages, and disgorgement of any 11 profits made by Defendant as a result of the violation set forth herein but no less than \$1,000 for Plaintiff, and each of those similarly situated; punitive damages and [sic] Court considers just; and reasonable attorneys fees”
12 CAC ¶10:22-26.	“Pursuant to California Civil Code § 1780(a)(3), Plaintiff, on behalf 13 of himself and similarly situated Class Members, seeks 14 compensatory damages, punitive damages and restitution of any ill- gotten gains due to Defendant’s acts and practices.” 15 “Plaintiff also requests that this Court award him his costs and 16 reasonable attorneys’ fees pursuant to California Civil Code § 1780(d).”
17 CAC ¶13:15-17	“including statutory damages of \$3,000 per violation suffered by 18 himself or those similarly situated”
19 CAC ¶14:1-2	“Plaintiff and those similarly situated are entitled to actual and 20 punitive damages and injunctive relief for the above-mentioned tortuous act of Defendant.”
21 CAC ¶15:6-7	“Awarding Plaintiff and those similarly situated statutory and actual 22 damages of no less than \$1,000 per class member;”
23 CAC ¶15:8-10	“Awarding Plaintiff and those similarly situated statutory and actual 24 damages of no less than \$1,000 per California Subclass member for Defendant’s violation of Cal. Civ. Code § 1770, <i>et seq.</i> ;”
25 CAC ¶15:11-13	“statutory” ... “of no less than \$3,000 per California Subclass 26 member”
27 CAC ¶15:14-16	“Awarding compensatory damages in favor of Plaintiff and the 28 Class members against Defendant, for all damages sustained as a result of Defendant’s violations of the laws set forth above, in an amount to be proven at trial, including interest thereon;”

1		
2	CAC ¶15:17	“Awarding statutory penalties;”
3	CAC ¶ 15:18-19	“Ordering Defendant to disgorge revenues and profits wrongfully obtained”
4	CAC ¶15:20	“Awarding Plaintiff and those similarly situated punitive damages;”
5	CAC ¶15:21-22	“Awarding Plaintiff and those similarly situated their reasonable costs and expenses incurred in this action, including counsel fees and expert fees;”
6		
7		

8       Defendant further requests that the Court limit Plaintiff's claims to the period  
 9 commencing one year before the filing of the complaint (i.e. October 4, 2006), as claims  
 10 prior to that date are also barred by the Exclusive Remedy / Time Limitation provision.

11       Additionally, an independent reason for striking any reference to the \$3,000  
 12 statutory damages that Plaintiff seeks under the California Consumer Records Act (Count  
 13 IV) is that statutory damages are not authorized by the provisions under which Plaintiff has  
 14 brought his claim. See CAC ¶¶15:11-13; 13:15-17. In particular, the Complaint alleges  
 15 violations of Cal. Civ. Code sections 1798.81 and 1798.81.5. CAC ¶¶56-57. The only  
 16 remedies available by statute under these provisions are civil “damages.” Cal. Civ. Code  
 17 §1798.84(b). On claims under Section 1798.83, which Plaintiff does not allege was  
 18 violated, support the \$3,000 statutory remedy. Cal. Civ. Code §1798.84(c).

19       VIII. The Court Should Strike the Incorrect “Privacy Policy” Label

20       The Complaint mislabels a selective quotation from the Services Agreements as  
 21 Network Solutions’ “Privacy Policy.” CAC ¶9. This is contrary to the express language of  
 22 the Service Agreements, which incorporate by reference a distinct Privacy Policy available  
 23 on the Network Solutions Website. See Exhs. 1-5 at RFJN 0003, 0051-52, 0088, 0126-27,  
 24 and 0221-22. This incorrect label confuses the legal issues in the Complaint, because Bus.  
 25 & Prof. Code §22576, upon which Plaintiff grounds a portion of his Unfair Competition  
 26 Law claim (Count III), establishes requirements for Network Solutions’ actual Privacy  
 27 Policy, not the selective quote Plaintiff misconstrues. Moreover, the actual Privacy Policy  
 28

1 covers only the information that Network Solutions collects from its customers for billing  
 2 purposes, which is distinct from the webmail contents that it stores as a customer service.  
 3 Plaintiff's Complaint does not allege that any billing information was released, or that the  
 4 actual Privacy Policy has been breached.

5 Thus, the improper "Privacy Policy" label confuses the issues in this case and  
 6 should be stricken. In particular, Defendant respectfully requests that the Court strike the  
 7 following language from the Complaint:

8 CAC at 3:5	"that incorporates and includes a Privacy Policy"
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9

10 **IX. Conclusion**

11 For all of the reasons set forth above, Plaintiff respectfully requests that the court  
 12 strike provisions of the Complaint inconsistent with the Service Agreements or substantive  
 13 law, pursuant to Federal Rule of Civil Procedure §12(f).

14 Date: November 28, 2007

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 18 JOHN M. GRENFELL  
 19 DAVID L. STANTON

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21 By /s/ \_\_\_\_\_  
 22 Sheri Flame Eisner  
 23 Attorneys for Defendant  
 24 NETWORK SOLUTIONS, LLC

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